IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. COLIN MARK SMITH, a/k/a MARK C. SMITH, Appellant.	No. 63348-1-I DIVISION ONE UNPUBLISHED OPINION FILED: July 19, 2010

Leach, A.C.J. — Colin Mark Smith appeals his conviction for residential burglary. He contends that the trial court erred in failing to instruct the jury on the lesser offense of criminal trespass. Because the evidence did not support this instruction, we affirm.

Background

On the morning of June 22, 2008, Paul Jefferson was cleaning his apartment. He left the front door of his apartment open. At trial, Jefferson described his single bedroom apartment as having a "J" shaped layout. The front and only door of the apartment opens into the living room, which is connected to a narrow corridor that leads to the kitchen area and into the back bedroom and bathroom. The unit is small enough that a person can see the front door from the bedroom through the corridor, but neither the front door nor the living room can be seen from the bathroom. Jefferson testified that it takes

only "a matter of seconds" to walk from the front door into the bathroom. He further stated that, due to the apartment's size, a person in the bathroom could hear if anyone was talking in the living room.

Around 10:00 a.m. on the day of the incident, Jefferson was in the bathroom retrieving cleaning supplies from beneath the sink. He had been in the bathroom for three to five minutes with the bathroom door open and was exiting it when he saw Smith standing next to the dresser in his bedroom.

Jefferson was startled to see a stranger in his bedroom. He observed that Smith's eyes were "really bloodshot red" and that he appeared intoxicated but not confused. Rather, Smith seemed "surprised that there was actually someone home." Smith also looked unkempt, wearing a black jacket and black jeans. When Jefferson confronted Smith about his presence in the apartment, Smith said that he needed a ride. Jefferson demanded that Smith leave his apartment. Smith started walking to the bedroom door but paused to tell Jefferson to "be cool or something." Jefferson again demanded that Smith get out of the apartment and started pushing him through the bedroom and into the kitchen. As they passed the kitchen area, Jefferson grabbed a knife and told Smith that he was going to cut him if he did not immediately leave. Jefferson continued to push Smith until he was outside the front door. Throughout the encounter, Smith told Jefferson that he was overreacting and that he "did not have to be like that." Jefferson testified that he did not see anyone else inside his apartment that morning or in the area outside of his apartment when he pushed Smith out of his

apartment.

Jefferson then locked the front door and called the police. While on the telephone, Jefferson verified that his wallet was not taken. Soon police officers arrived, and Jefferson gave them a description of Smith. One officer, Sergeant Pieper, performed an area check and spotted two individuals walking in a nearby alley. One of the men, later identified as Smith, wore a black jacket and a black baseball cap, matching the description given by Jefferson. The other man, who identified himself as Kidane, wore a green jacket and a black baseball cap and carried a black backpack. In detaining both men, Pieper testified that Smith was so intoxicated that he had to tell Smith several times to keep his hands on the patrol car.

Officer Orneles and student officer Sayaphouthone responded to Pieper's radio broadcast of the location and arrived at the alley. Sayaphouthone, under the supervision of the other officers, searched the backpack carried by Kidane. Inside the backpack were photographs of Smith, an envelope with Smith's name on it, some clothing, 13 cigars, and a cigar cutter.

Orneles radioed Officer Banez to transport Jefferson to the scene, where Jefferson identified Smith as the man who had been in his apartment. Banez then drove Jefferson back to his apartment and obtained a written statement from him. About 15 minutes later, Orneles and Sayaphouthone returned to Jefferson's apartment with the backpack that Kidane had been carrying. Because Jefferson did not see Smith wearing a backpack in his apartment and

because he believed that nothing had been taken from his apartment, Jefferson said that he was not interested in the contents of the backpack until he saw the cigars and the cigar cutter. Jefferson then realized that a cigar box, which contained the cigars and cigar cutter, was missing from the bookshelf in the living room. Banez took photographs of Jefferson's apartment, the bookshelf where the cigar box had been, the cigars, and cigar cutter. The cigar box was never found, and Banez did not check for fingerprints.

Smith was charged with residential burglary. At trial, the State called several witnesses, including Jefferson and Officers Pieper and Banez. Smith did not testify or call any witnesses on his behalf. The trial court refused Smith's proposed instruction on first degree criminal trespass, and the jury found him guilty as charged.

Standard of Review

We review a trial court's refusal to give an instruction based on a factual dispute for abuse of discretion.[1]

Analysis

Smith proposed a jury instruction on criminal trespass as a lesser included offense of residential burglary. The trial court refused to give the instruction, reasoning that Smith had presented no affirmative evidence supporting the conclusion that he committed only criminal trespass.

[1] See State v. Lucky, 128 Wn.2d 727, 731, 912 P.2d 483 (1996), overruled on other grounds by State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997).

RCW 10.61.006 confers the right to present a jury instruction on a lesser included offense. A defendant is entitled to this instruction if (1) each of the elements of the lesser offense is a necessary element of the greater offense (the legal prong) and (2) the evidence in the case supports an inference that the lesser offense was committed (the factual prong).[2]

The State properly concedes that Smith met the legal prong. A person commits residential burglary if he enters or remains unlawfully in a dwelling with intent to commit a crime therein.[3] A person commits criminal trespass if he knowingly enters or remains unlawfully in a building.[4] The definition of "building" includes any dwelling.[5] Thus, each of the elements of first degree criminal trespass is a necessary element of residential burglary, satisfying the legal prong of the test.[6]

The factual prong is at issue here. To satisfy this prong, "substantial evidence in the record [must] support[] a rational inference that the defendant committed only the lesser included or inferior degree offense to the exclusion of the greater offense."[7] While the evidence is viewed in the light most favorable to the party seeking the instruction, it must "affirmatively establish the defendant's

---

[2] Berlin, 133 Wn.2d at 545-46; State v. Workman, 90 Wn.2d 443, 447-48, 584 P.2d 382 (1978).

[3] RCW 9A.52.025.

[4] RCW 9A.52.070.

[5] State v. Pittman, 134 Wn. App. 376, 384, 166 P.3d 720 (2006) (citing RCW 9A.52.025 (1)).

[6] Pittman, 134 Wn. App. at 384.

[7] State v. Fernandez-Medina, 141 Wn.2d 448, 461, 6 P.3d 1150 (2000).

theory of the case—it is not enough that the jury might disbelieve the evidence pointing to guilt."[8]

Here, Smith contends that several pieces of evidence rationally support that he did not have the intent to commit a crime in Jefferson's apartment. Smith urges the conclusion that he entered the apartment only looking for a ride, that he was too intoxicated to form criminal intent, and that Kidane took the cigars and cigar cutter. In particular, Smith points out that (1) Jefferson had been in the bathroom for three to five minutes and could not see the front door or living room from the bathroom, (2) a person could enter through the front door of Jefferson's apartment and reach the back bedroom within a few seconds, (3) Jefferson and Sergeant Pieper observed that Smith was intoxicated, (4) Smith said he needed a ride when confronted by Jefferson, (5) Jefferson never saw Smith with a backpack or take any property, and (6) Kidane was found carrying the backpack with the cigars and cigar cutter.

Contrary to Smith's contention, these pieces of evidence do not constitute affirmative evidence from which the jury could infer that Smith committed only the lesser offense of criminal trespass. As stated above, it is not enough to argue that the jury could have found Smith guilty of criminal trespass. Jefferson testified that he was in the bathroom for three to five minutes with the bathroom door open. Although he could not see if anyone was in the living room,

[8] Fernandez-Medina, 141 Wn.2d at 456 (citing State v. Fowler, 114 Wn.2d 59, 67, 785 P.2d 808 (1990), overruled on other grounds by State v. Blair, 117 Wn.2d 479, 816 P.2d 718 (1991)).

Jefferson saw only Smith in his apartment and did not hear any other voices in the apartment at any time before or during his confrontation with Smith. In addition, while Smith may have taken only a few seconds to walk into Jefferson's bedroom, Jefferson emphasized that Smith had passed through the living room and kitchen area before he was seen standing at the door of the bathroom. After being spotted by Jefferson, Smith seemed surprised and then tried to legitimize his presence by telling Jefferson that he needed a ride. While Smith appeared intoxicated, Jefferson testified that Smith did not seem confused and repeatedly told Jefferson, who yelled, shoved, and threatened Smith with a knife, to calm down. And although Jefferson did not see Smith wearing a backpack or removing items from his apartment, Smith was seen shortly afterward walking in a nearby alley with Kidane, who was carrying the backpack containing the cigars and cigar cutter, as well as photographs of Smith and a letter with Smith's name on it.

Notably, there is no evidence in the record placing Kidane in Jefferson's apartment. Furthermore, evidence that Smith was intoxicated and asked for a ride after being caught in Jefferson's bedroom does not rationally support an inference that Smith committed only criminal trespass. Ultimately, Smith offers as an alternative to the State's evidence the explanation that someone else, Kidane, took Jefferson's property—with no evidence to support this explanation. This does not constitute affirmative evidence establishing that he intended only to trespass.

State v. Fernandez-Medina,[9] on which Smith relies, is distinguishable. There, Fernandez-Medina fired five shots into an apartment and pointed his gun at one victim's head.[10] While no one saw the defendant pull the trigger, witnesses heard a click, but no bullet discharged.[11] The State charged Fernandez-Medina with attempted murder or, in the alternative, first degree assault.[12] After the testimony by the forensic experts for both parties showed that the type of gun used by Fernandez-Medina could make various sounds without pulling the trigger, Fernandez-Medina requested a jury instruction for a lesser assault charge that did not include intent to inflict serious bodily harm.[13] Our Supreme Court held that Fernandez-Medina was entitled to the instruction because the testimony given by the forensic experts supported an inference that Fernandez-Medina had not pulled the trigger.[14] Here, in contrast, there is no affirmative evidence allowing the jury to infer that Smith committed only the lesser offense of criminal trespass.

Conclusion

Because there was no affirmative evidence allowing the jury to infer that Smith intended only to trespass, we hold that the trial court properly refused to give Smith's requested instruction.

---

[9] 141 Wn.2d 448, 6 P.3d 1150 (2000).
[10] Fernandez-Medina, 141 Wn.2d at 451.
[11] Fernandez-Medina, 141 Wn.2d at 451.
[12] Fernandez-Medina, 141 Wn.2d at 451.
[13] Fernandez-Medina, 141 Wn.2d at 452.
[14] Fernandez-Medina, 141 Wn.2d at 450.

Affirmed.

Leach, A.C.J.

WE CONCUR:

Spearman, J.

Cox, J.